Ameron Automotive Centers, a Division of the Kelly-Springfield Tire Co.; F. W. Woolworth Company d/b/a Woolco Division, Joint Employers *and* International Brotherhood of Craftsmen, Professional and Allied Trades, Local 101. Cases 29-CA-6676-1, 29-CA-6676-2, 29-CA-6736, 29-CA-6823, 29-CA-6914, 29-CA-7015, 29-CA-7053, and 29-RC-4321

November 30, 1982

DECISION AND ORDER

On December 5, 1979, Administrative Law Judge Stanley N. Ohlbaum issued the attached Decision in this proceeding. Thereafter Respondents filed exceptions and a supporting brief.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions[1] and brief[2] and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The Administrative Law Judge found that Respondents violated Section 8(a)(1) of the Act by promulgating an unlawfully broad, written no-solicitation rule applicable to its employees.[3] He further found that Respondents violated Section 8(a)(1) by promulgating a total ban on nonemployee solicitation under circumstances which effectively precluded the Union from reaching the employees with its message, and also violated Section 8(a)(1) by enforcing this ban on solicitation in a discriminatory manner.[4] To remedy these unfair labor practices, the Administrative Law Judge recommended, *inter alia*, that Respondents be required to rescind the published rule banning solicitation by nonemployees[5] and to permit nonemployees to engage in organizational solicitation of its employees on the sidewalks and parking areas adjacent to its buildings and also in its restaurants. With respect to the restaurants, the Administrative Law Judge prescribed certain limitations as to the manner in which such solicitation should be conducted.

We agree with the Administrative Law Judge's finding that Respondents violated Section 8(a)(1) by denying the Union access to the sidewalk adjacent to the Woolco store. Our dissenting colleagues construe this conclusion as, *inter alia*, adoption of a "shopping center exception" to the general rule that an employer may deny access to its property to nonemployees. Yet even a cursory review of the Administrative Law Judge's Decision in this case reveals that he engaged in a detailed analysis of the factors found by the Court in *N.L.R.B.* v. *Babcock & Wilcox*[6] to be relevant in *all* cases involving nonemployee access to private property. After taking into consideration all of the circumstances surrounding both the Union's attempts to communicate with Respondents' employees and the efficacy of methods not utilized by it, the Administrative Law Judge concluded that the alternative means for communicating with employees here was severly restricted and, therfore, the employees' Section 7 right to receive information on their right to organize was jeopardized. Yet our dissenting colleagues would under these circumstances have us deny the Union access to areas which are otherwise open to any member of the public—an "intrusion" upon Respondents' private property rights which, in our view, requires only a "temporary and minimal" yielding of these rights.[7] We believe that *Babcock & Wilcox* and its progeny do not compel such a result in a case such as this.[8] Rather, in striking the

[1] Respondents have moved the Board to amend the "caption" in this case to delete any reference to Ameron Automotive Centers, a Division of the Kelly-Springfield Tire Co., on the ground that, as of January 1, 1980, Ameron and Woolco are no longer the joint employers of the employees employed at the automotive centers involved herein. Respondents claim that Woolco is capable of remedying any unfair labor practices found by the Board. The General Counsel opposes this motion. Since Respondents were joint employers of these employees at the time the unfair labor practices were committed, they are jointly liable to remedy these unfair labor practices. Accordingly, Respondents' motion is denied.

[2] Respondents have requested oral argument. This request is hereby denied as the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

[3] The Administrative Law Judge also found the evidence insufficient to support a claim that Respondents on several occasions orally proscribed lawful solicitation by its employees. No exception has been taken to this finding.

[4] As the Supreme Court noted in *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), an employer "may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." 351 U.S. at 112. In the present case, the record reveals that not only were there no other reasonable means of communicating the Union's organizational message to employees, but also that Respondent enforced its ban on nonemployee solicitation in a discriminatory manner. Thus, Respondent's prohibition is deficient under both of the criteria set forth in *Babcock & Wilcox*.

[5] "Woolco Policy No. 3G" states that:

> Soliciting is not permitted by any outside person, organization or organization's representative among the selling and non-selling employees on the premises of this store at any time.

[6] 351 U.S. 105 (1956).

[7] *Central Hardware Co.* v. *N.L.R.B.*, 407 U.S. 539, 545 (1972). The fact that an area is open to the public has been considered relevant by both the Board and the courts in applying the balancing test of *Babcock & Wilcox*. See, e.g., *Giant Food Markets, Inc.*, 241 NLRB 727 (1979), enforcement denied 633 F.2d 18 (6th Cir. 1980); *Seattle-First National Bank* v. *N.L.R.B.*, 651 F.2d 1272 (9th Cir. 1980).

[8] We are not persuaded by our colleagues' assertion that it is inappropriate for the Board to provide an order granting access to the Union based upon Respondents' discriminatory application of its nonemployee no-solicitation rule. Even assuming that Respondents' denial of access to the Union was not otherwise unlawful, the discriminatory application of the rule alone is sufficient to warrant such an order. In *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978), which is quoted by our colleagues, the Supreme Court reiterated that "[t]o gain access, the union has the burden of showing that no other

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balance between the Section 7 rights of the employees herein and Respondents' private property rights, we find that the effective exercise of the former requires a minimal intrusion upon the latter; namely, union access to public areas adjacent to Respondents' business.[9] This finding in no way excepts shopping centers from the general rule prescribed in *Babcock & Wilcox* but instead is a conscientious application of the criteria set forth in that case to the circumstances presented herein.[10]

However, the Administrative Law Judge further found that the issue of whether nonemployees were entitled to access for union solicitation purposes to Respondent Woolco's "Harvest House" public restaurants required application of the "balancing" test prescribed in *Babcock & Wilcox Co.* We do not agree. Respondents' nonemployee no-solicitation rule purports to prohibit solicitation by nonemployees "on the premises of this store," thus encompassing the "Harvest House" restaurant premises. The Board has held such rules as applied to public restaurants are unlawfully broad, and that union solicitation by nonemployees in an employer's restaurant, if conducted in a manner consistent with the purpose of the restaurant, cannot be so proscribed.[11] Thus, unlike the situation where nonemployee union organizers seek access to "private" or other[12] areas in which an employer may generally prohibit nonemployee solicitation, here the *Babcock & Wilcox* criteria need not be met, since nonemployees cannot in any event lawfully be barred from patronizing the restaurant as general members of the public. Accordingly, Respondents' rule prohibiting solicitation by nonemployees on the entire premises is unlawfully broad, regardless of whether, under *Babcock & Wilcox*, the Union in this case had other available channels of communication sufficient to enable it to reach Respondent's employees with its message.[13]

Similarly, we find inappropriate that part of the recommended Order which affirmatively provides for nonemployee access to the "Harvest House" restaurants. Such an affirmative Order is an extraordinary remedy provided in cases where the *Babcock & Wilcox* criteria have been satisfied and, accordingly, nonemployee access to areas which ordinarily could be lawfully posted is granted by the Board "to the extent needed to permit communication of information on the right to organize."[14] Since we find that Respondents cannot in any event lawfully prohibit union organizers from patronizing their restaurants and meeting with its off-duty, nonrestaurant employees, it is unnecessary to provide an affirmative order under *Babcock & Wilcox* granting access to the restaurants. Accordingly, we conclude that the Administrative Law Judge's recommended Order requiring Respondents to cease and desist from maintaining and enforcing their nonemployee no-solicitation rule and requiring Respondents to rescind such rule is sufficient to remedy the violation with respect to the restaurants.[15]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Ameron Automotive Centers, a Division of the Kelly-Springfield Tire Co., St. Louis, Missouri, and F. W. Woolworth Company, d/b/a Woolco Division, New York, New York, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining in effect, announcing, asserting, enforcing, publishing, displaying, disseminating, communicating, or threatening any total ban on

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reasonable means of communicating its organization message to the employees exist or that the employer's access rules discriminate against union solicitation." (Emphasis supplied.) Furthermore, if one were to accept out colleagues' view, an employer who violates the Act by initiating strict enforcement of its no-solicitation rule upon commencement of an organizing campaign would be free to continue such a policy, whose only purpose was to thwart organizing activity. Contrary to our dissenting colleagues, we do not view our remedy as a penalty but rather a return to the situation preceding the unlawful conduct since, in effect, we merely require that the Union be permitted to solicit to the same extent as the numerous other persons who were permitted to do so prior to the advent of the organizing campaign.

[9] Our colleagues' assertion that access to the parking lots was sufficient for the Union to identify and communicate with employees coming to work is without merit. The Adminstrative Law Judge found that Respondents' employees were not required to wear any identifying clothing or badges to and from work. He also found that, although there were two specially designated areas for employee parking, those areas were not restricted to employees and, more important, in practice the employees parked elsewhere as well. Thus, we agree that it was difficult to distinguish Woolco employees from employees of numerous other stores in the shopping center or, for that matter, from customers of the mall, until they approached the entrances to the Woolco store itself. Accordingly, the Administrative Law Judge correctly found that access to the sidewalk adjacent to the store was necessary in order to enable organizers to identify Respondents' employees.

[10] In adopting the Administrative Law Judge's conclusion that Respondents violated Sec. 8(a)(1) by enforcing the ban on solicitation by nonemployees in a discriminatory manner, we do not rely on the fact that on numerous occasions Respondent Ameron permitted nonemployee tool salesmen to solicit sales on its premises. See *Rochester General Hospital*, 234 NLRB 253, 259 (1978).

[11] See, e.g., *Montgomery Ward & Company, Inc.*, 256 NLRB 800 (1981).

[12] We note that an employer may generally prohibit solicitation on its selling floor areas and solicitation of its restaurant employees within the restaurant. See, e.g., *Marshall Field & Company*, 98 NLRB 88 (1952), modified on other grounds and enfd. 200 F.2d 375 (7th Cir. 1952); see also *Montgomery Ward & Company, Inc., supra; Montgomery Ward & Co., Incorporated*, 162 NLRB 369 (1966).

[13] See *Montgomery Ward & Company, Inc.*, 256 NLRB at 801.

[14] 351 U.S. at 112.

[15] See, e.g., *Montgomery Ward & Company, Inc., supra.* Thus, it is unnecessary for the Board to determine whether, under the balancing test of *Babcock & Wilcox*, access to the restaurants is necessary for the employees to be able to receive information on their right to organize.

lawful organizational solicitation under the Act by their employees on Respondents' premises.

(b) Discriminatorily applying or enforcing, against employees or nonemployee union representatives, any rule forbidding solicitation on Respondents' premises.

(c) Maintaining and enforcing "Woolco Policy Number 3G" pertaining to soliciting or any other policy, rule, regulation, or requirement totally forbidding solicitation by any nonemployee at all times and on all parts and portions of Respondents' premises.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

(a) Rescind and annul any and all prohibitions of lawful organizational solicitation under the Act by Respondents' employees on Respondents' premises.

(b) Rescind and annul "Woolco Policy Number 3G" pertaining to soliciting by nonemployees or outside persons.

(c) Permit employees to engage in orderly solicitation on behalf of a union or unions during nonworking time, on all portions of their premises except sales floors and automotive service shops while they are open to customers.

(d) Permit nonemployees, including union representatives, to engage in orderly organizational solicitation of Respondents' employees, lawful under the Act, on sidewalks and parking areas.

(e) Post at their store and automotive shop premises in Rocky Point, Patchogue, Bridgehampton, Riverhead, and Lake Ronkonkoma, Long Island, New York, copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondents' authorized representatives, shall be posted by them immediately upon receipt thereof, and be maintained by employees for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

[16] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

CHAIRMAN VAN DE WATER and MEMBER HUNTER, dissenting in part:

We agree with our colleagues that Respondents violated Section 8(a)(1) of the Act by publishing an unlawfully broad no-solicitation rule applicable to its employees, by publishing an overly broad no-solicitation rule applicable to nonemployees,[17] and by enforcing its ban on nonemployee solicitation in a discriminatory manner. Our paths part, however, when our colleagues further find that Respondents, by refusing access to the sidewalk in front of their building to nonemployee union organizers, additionally violated Section 8(a)(1) on the ground that such conduct denied the employees their Section 7 right to receive information on organization. In our opinion, applying the criteria set forth by the Supreme Court in *N.L.R.B.* v. *Babcock & Wilcox Co.*,[18] the evidence in this case is insufficient to support the conclusion that the employees involved herein are beyond the reach of reasonable union efforts to communicate with them through other, more customary channels.

In *Babcock & Wilcox*, the Supreme Court held that "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available methods of communication will enable it to reach the employees with its message."[19] However, in describing the circumstances under which this right to prohibit nonemployee solicitation must give way in some measure to the Section 7 right of employees to receive the union's message, the Court stated that:

> [I]f the location of a plant *and the living quarters of the employees* place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must

[17] We agree with our colleagues that Respondents may not summarily prohibit nonemployee union organizers from patronizing the Harvest House restaurant and, as a corrollary, meeting with off-duty, nonrestaurant employees similarly patronizing the restaurant. We would note, however, that a union organizer's right to speak with such employees has been limited to solicitation "only as an incident to normal use of such facilities." *Marshall Field & Company*, 98 NLRB 88, 94 (1952). See also *Montgomery Ward & Company, Inc.*, 256 NLRB 800 (1981). Such solicitation does not include moving from table to table to solicit off-duty employees. See *Marshall Field, supra*. Accordingly, solicitation by nonemployees would by necessity be effectively limited to prearranged meetings during breaks or mealtime provided, of course, that, as here, the employer ordinarily permits its off-duty store employees to take their meals or breaks at the restaurant on its premises. To hold otherwise would permit an employer to discriminate against customers and off-duty employees solely on the basis of the content of their conversations while eating. To this extent we agree with our colleagues that the right of nonemployee union organizers to patronize Respondents' public restaurant does not turn on whether alternative means of communication with employees are available to the Union.

[18] 351 U.S. 105 (1956).

[19] *Id.* at 112.

allow the union to approach his employees on his property.[20]

Mindful of this language, the Board has in the past considered the accessibility of employees' homes to be an important factor in determining whether a union must be permitted to enter private property for purposes of organizational solicitation. For example, where the employees' living quarters are on the employer's premises and there is virtually no other way for the union to reach the employees, the Board has found it unlawful for the employer to prohibit union solicitation by nonemployees on its premises.[21] Similarly, when the employees' residences are so widely dispersed that home contact is effectively precluded, the Board has concluded that union access to the employer's premises cannot be denied.[22] In these cases, the determination of whether "reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message"[23] has in large measure been predicated upon the accessibility of employees' homes to union organizers.

In the present case, the record is devoid of any evidence as to where Respondents' employees reside and, consequently, whether they are accessible to union organizers. The only witness who testified at all concerning this issue stated that he had no personal knowledge as to where any of the approximately 70 Woolco employees at the Rocky Point store lived.[24] The Administrative Law Judge found that the shopping centers in question are located in and service "dispersed suburban or semirural communities," concluding from this fact alone that the Union was unable to reach Respondents' employees at home "because of their presumably relatively distant geographic commuting dispersal from Respondents' locations." We were not aware that, where an employer's place of business is located in a "suburban or semirural" area, the Board will presume that the employer's employees live in distant geographic areas and from that presumption alone will infer that they are beyond the reach of reasonable union efforts to communicate with them at their residences. On the contrary, the Board has refused to give controlling weight to the demographic makeup of the area surrounding the employees' workplace. In *Monogram Models, Inc.*,[25] the General Counsel contended that alternative methods of communication were not available to the union and were not feasible in any event because respondent's employees lived in the Chicago metropolitan area, which allegedly made them just as inaccessible as employees who live on their employer's premises. The Board rejected this generalization, stating:

> We do not believe it wise or proper to adopt a "big city rule" and a different "small town rule" in applying *Babcock and Wilcox*, or to attempt to determine how big a city must be to justify the proposed differing application. Concededly, it may be more convenient and less expensive for the Union to use the Respondent's property for the purpose of organizing the employees here involved. That was also true under the facts of *Babcock and Wilcox*. But the test established there was not one of relative convenience, but rather whether "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them . . . ." The facts here do not, in our view, justify such a conclusion, and we are unwilling to make that conclusion solely upon the basis of the plant's location in a metropolitan area.[26]

Here, however, our colleagues have in effect *sub silentio* adopted a "suburban" or "rural" rule, which presumes that employees working in a rural area live such great distances from their workplace and from each other that they are necessarily beyond the reach of reasonable efforts to communi-

[20] *Id.* at 113 (emphasis supplied).

[21] See, e.g., *S & H Grossinger's Inc.*, 156 NLRB 233 (1965), enfd. 372 F.2d 26 (2d Cir. 1967) (as many as 65 percent of the employees residing on the employer's premises). In the context of a representation election campaign, see *Husky Oil NPR Operations, Inc.*, 245 NLRB 353 (1979), enfd. 669 F.2d 643 (10th Cir. 1982); *Alaska Barite Company*, 197 NLRB 1023 (1972), enfd. 83 LRRM 2992, 71 LC¶ 13, 878 (9th Cir.), cert. denied 414 U.S. 1025 (1973); *Sioux City and New Orleans Barge Lines, Inc.*, 193 NLRB 382 (1971), enforcement denied 472 F.2d 753 (8th Cir. 1973).

[22] See *Belcher Towing Company*, 238 NLRB 446 (1978), enforcement denied 614 F.2d 88 (5th Cir. 1980) (employees' residences scatttered over 40 different towns hundreds of miles apart). In the election context, see *Sioux City and New Orleans Barge Lines, Inc.*, 193 NLRB 382 (1971) (employees residing in 15 different States).

[23] 351 U.S. at 112.

[24] William Koenig, the Union's president, testified as follows:

> Q. (By the General Counsel) Mr. Koenig, have you ever obtained knowledge where these 70 employees at the Woolco Rocky Point store live?
>
> A. No, I don't know their home addresses, no.
>
> Q. Do you have any idea where they may be living?
>
> A. I would—
>
> Q. These particular employees at the Woolco Rocky Point store?
>
> A. I think I would judge from the rate of pay that they would be living in the Eastern Suffolk area, because of the low pay an the cost of comutation [sic] it wouldn't seem reasonable that they would be living outside the Eastern Suffolk area.
>
> Q. Other than your conclusion based on the low wages, do you have any knowledge where these particular 70 Woolco Rocky Point employees live?
>
> A. No.

We note here that the parties stipulated that all five of Respondent's business permises and the shopping center configurations are "substantially similar." However, there is no indication in the record as to where the employees working at Respondent's other four locations reside in relation to the stores and each other. The Administrative Law Judge apparently presumed that they, too, live in "relatively distant" and dispersed locations, although again there is no evidence to support such a finding.

[25] 192 NLRB 705 (1971).

[26] *Id.* at 706.

cate with them at home.[27] We cannot accept such a principle.

We are not unmindful of the fact that a union must know the names and addresses of employees in order to be able to contact them at home. However, here again the evidence is insufficient to warrant a finding that the Union, through reasonable efforts, would have been unable to ascertain the names and addresses of the Woolco employees in order to facilitate contact with them off the shopping center premises. In this regard, Union President Koenig testified that he was unable to ascertain the names and addresses of nearly all of the Woolco employees, with the exception of the four or five who signed authorization cards. He testified that the Union asked Vincent Stasio, an employee who worked in the Ameron automotive service department located in a separate part of the building, to obtain such information. Since Stasio ostensibly did not know many of the Woolco employees and did not have ready access to employee timecards, etc., Koenig testified that Stasio's efforts were unsuccessful. However, Koenig also testified, incredibly in our view, that the employees who signed authorization cards were unable to provide even the *names* of fellow employees, individuals who presumably worked with them regularly.[28] As to those employees who attended the two off-premises union meetings, there is no evidence that the Union asked them for this information. On the record before us, we do not think that the Union's efforts in this regard were reasonable,[29] and we find it hard to believe that reasonable efforts would not have yielded a substantial number of names and addresses.[30]

Neither was the avenue of off-premises meetings with employees sufficiently shown to be unavailable to the Union. As noted above, the Union held two major organizational meetings off the shopping center premises. Koenig testified that the first meeting was attended by about 15 percent of the employees, but the second meeting generated only 5-percent attendance. The Administrative Law Judge found that off-premises meetings were not a viable channel of communication because of "the wide geographical dispersal of the employees, the necessity to hold such meetings early in the morning before store opening time or late at night after store closing time, the high cost of and national policy to economize upon use of gasoline, and the demonstrated inefficacy of such attempts." In our opinion, the Administrative Law Judge's rationale is deficient in several important respects. First, it is irrelevant that these meetings would necessarily have to be held before or after work. The Board has stated that the test established in *Babcock & Wilcox* is "not one of relative convenience."[31] The mere fact that it may be inconvenient for employees to meet with the Union before or after work does not mean they are beyond the reach of reasonable efforts to communicate with them in this manner. Second, as noted above, there is no evidence that the employees in fact live in a widely dispersed geographical area. Thus, even if the cost of gasoline and Federal energy policy can be considered relevant considerations in this case, which we doubt, no showing of prohibitive expense to employees or the Union has been made. Finally, the Administrative Law Judge's reliance on the fact that the meetings the Union did not hold were poorly attended is misplaced, since there is no indication in the record that the distance and time problems alluded to were actually responsible for the sparse turnout.[32] In our opinion, the mere fact that the meetings were poorly attended does not necessarily mean that such an avenue of communication is "unavailable" under *Babcock & Wilcox*. Without more, it might just as easily be true that the employees here were not interested in organizing under the auspices of this Union, especially since the number of participants decreased after the first meeting.

Accordingly, we would dismiss this part of the complaint since there is no evidence that the employees live in inaccessible areas, that the Union through reasonable efforts could not have obtained

[27] The fact that the employees may not all live in the same or neighboring towns is a far cry from the situation in several of the cases in which the Board has found employees' homes inaccessible. In *Belcher Towing Company*, 238 NLRB 446, (1978) the employees lived in over 40 different towns spread throughout the State of Florida. In *Sioux City & New Orleans Barge Lines, Inc.*, 193 NLRB 282 (1971), employees resided in 15 different States. Although such extreme examples are not the only circumstances in which we would find employees' homes beyond the reach of union organizers, we do not accept the view that, if an employer's employees live more than a few miles apart, the union cannot be expected to contact them at home. We suspect that there are very few businesses whose employees live in such proximity today.

[28] He further testified that these employees told him they were afraid to "attempt to gather names and addresses because of fear of reprisals."

[29] It may not always be necessary to show that the union in fact tried a particular avenue of communication in order to prove that such an approach is futile. See *Hutzler Brothers Company*, 241 NLRB 914 (1979), enforcement denied 630 F.2d 1012 (4th Cir. 1980); but see *Rochester General Hospital*, 234 NLRB 253, 260 (1978). However, we note that in many instances it is difficult to infer from a feeble attempt at a particular method of communication that a greater effort would have been ineffective.

[30] We do not think it necessary that each and every employee be directly within the reach of outside organizers or else an employer is guilty of an 8(a)(1) violation for prohibiting outsiders from soliciting on its property. However, the issue of whether a certain percentage of an employer's work force must be directly accessible is not before us in this case. But see *The Falk Corporation*, 192 NLRB 716, 723 (1971).

[31] *Monogram Models, Inc.*, 192 NLRB 705, 706 (1971).

[32] We note that the Union ascribed the lack of attendance and discontinuance of these meetings to reasons other than those cited by the Administrative Law Judge. Koenig testified that "the problem was that people were afraid to attend meetings."

the names and addresses of employees, or that union meetings outside the shopping center property were not an available method of communication.[33] Under these circumstances, the General Counsel has not proven that Respondents' employees are beyond the reach of reasonable efforts to contact them outside the shopping center.

Moreover, even assuming that the evidence was sufficient to warrant a finding that the employees could not be reached outside the shopping center premises, we would not find a violation of Section 8(a)(1) here, since the evidence also shows that the employees in any event were not denied the right to receive information concerning their right to organize. As noted by our colleagues, *Babcock & Wilcox* teaches that, when employees are indeed beyond the reach of union efforts to communicate with them off the employer's premises, the employer's right to exclude nonemployees must "yield to the extent needed to permit communication of information on the right to organize"[34] and, as noted by the Supreme Court in *Central Hardware Co.* v. *N.L.R.B.*, "the 'yielding' of property rights [required] is both temporary and minimal."[35] The Union here was able to distribute its literature on the shopping center premises without interference as long as it confined such distribution to the parking lot in front of Respondents' store. Since we believe, contrary to the Adminstrative Law Judge, that the evidence supports a finding that the Union was sufficiently able to identify Respondents' employees and communicate with them in this manner, we find that reasonable access to the shopping center property *was* in fact made available to the Union. Therefore, Respondents did not violate the Act by prohibiting distribution on the sidewalks, since this proscription did not interfere with the employees' Section 7 rights. For this additional reason, an affirmative order granting access to the sidewalks is unnecessary and inappropriate.

With respect to the Union's ability to identify employees, contrary to the Administrative Law Judge's conclusion, the record indicates that the Union was able in most instances to identify and distinguish Respondents' employees from its customers. Although some of the Woolco store employees are part-time employees and report to work at or around 5:30 p.m., most of Respondents' employees arrive for work before the store opens at 9:30 a.m. The majority of these employees arrive about 10 minutes before opening and the remainder, mainly office employees, report between one-half hour and 45 minutes before opening. Although the entrance is locked prior to the store opening, Respondents' security guard opens it so that employees may enter. At closing, the doors are locked, the lights dimmed, and customers are asked to leave. All employees, including the part-time employees reporting at 5:30 p.m., remain in the store for some minutes until all customers have left. The employees then leave through the main customer entrance. The union organizers themselves testified that they were able to identify the employees. Ronald Shannon, who passed out literature on October 7, 1979, testified that he and his companions began passing out this literature at or about 7:45 or 8 a.m. to people entering the store. He testified that the union organizers "would approach them and give them our literature right in the parking lot." Shannon further testified that he was able to identify these individuals as Respondents' employees "[b]ecause they were there early, and some of them had what looked like Woolco smocks." Finally, Shannon testified that, after the police requested the organizers to confine their distribution of literature to the parking areas, and as customers began to arrive, "we handed out literature to the customers, as well as to the employees."[36] Union President Koenig testified that some of the employees were distinguishable since they "wore a uniform [smock]" with "Woolco" on it. He futher stated that, since the store did not open until 9:30 a.m., "I must assume that the earlier people going in were employees."

From the foregoing testimony by the General Counsel's own witnesses, it is clear that many of Respondents' employees could be, and were in fact, identified by the union organizers and were offered literature. Under these circumstances, that the Union may have abandoned its distribution campaign after only two attempts and without reaching a substantial number of the employees is irrelevant.[37] What is important is the fact that, to the extent that Respondents acquiesced in the Union's solicitation and distribution of literature on the shopping center property, an accommodation of

[33] We do, however, agree with the Administrative Law Judge and our colleagues that communication through billboards, newspapers, radio, television, and the like was unreasonably burdensome and of questionable effect.

[34] 351 U.S. at 112.

[35] 407 U.S. 539, 545 (1972).

[36] It appears that, despite its asserted concern over wasting literature on nonemployees, the Union intended to convey its message to customers also. Union President Koenig at one point in his testimony made reference to the fact that organizer Michael Lorenzo was handing out literature to individuals disembarking from a bus from "the Senior Citizen Housing Project."

[37] The evidence indicates that distribution of literature was abandoned for reasons other than any inability to identify employees. Koenig testified that, in his opinion, this organizational method was of "limited value" and that "the whole point of, or half of the point of handbilling is to show the people that we could be there to hand out these handbills and there is nothing to be afraid of." Koenig also testified that, with its limited attempts at contacting employees, the Union reached 25 to 30 percent of Respondents' work force.

the conflicting rights referred to in *Babcock & Wilcox* was reached.[38] Thus, a finding that Respondents violated Section 8(a)(1), and an order requiring Respondents to permit distribution in other areas, cannot legitimately be justified on the ground that the Union will otherwise be unable to reach employees with its message and is, therefore, inappropriate.[39]

Recently, the Supreme Court had occasion in another context to comment on the balancing of the right of employees to receive the union message against the employer's or property owner's right to prohibit nonemployee solicitation on its premises. In *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*,[40] the Court stated:

> While *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule. To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation. That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity.[41]

The Court also noted that the right to access has generally been denied "except in cases involving unique obstacles to non-trespassory methods of communication with the employees,"[42] and review of the Board decisions since *Babcock & Wilcox* supports the Court's assessment.[43] We fear, however, that the Board has recently begun to alter long-standing case law which has presumed to leave unions and employees to their own devices with respect to organization absent unique or extraordinary circumstances warranting special treatment. We are unaware of any claim that the conventional methods of communication utilized successfully by employees and unions in the past are, as a general rule, no longer viable today. Yet our colleagues, by diluting or ignoring the appropriate standard of proof while paying little more than lip service to the criteria applied in previous cases,[44] have effectively paved the way for claims that an employer has violated Section 8(a)(1) any time conventional methods of organization are inconvenient and even when, as here, such methods are abandoned for reasons admittedly unrelated to the claim that these avenues are insufficient to permit the union to reach employees.

We are as concerned as our colleagues and the Administrative Law Judge that suburban shopping centers not "assume the character of Act-free enclaves" insulating employers and preventing employees from receiving important information on their Section 7 right to organize. We also recognize that, in attempting to balance the legitimate rights of both the employer and its employees, reasonable minds may differ as to the weight to be accorded the numerous factors which must necessarily be considered. Nevertheless, we believe that the circumstances herein, far from presenting any arguably "unique obstacles to non-trespassory methods of communication,"[45] merely evidence logistical

[38] In *May Department Store Company d/b/a Meier & Frank Co.*, 198 NLRB 491 (1972), respondent did not interfere with leafleting by nonemployees at its employee entrance on the shopping center property. The Board, in reversing the Trial Examiner, dismissed the complaint, stating that "we do not believe there exist any extraordinary circumstances which necessitate *additional union access* to the Respondent's facilities . . . ." (Emphasis supplied.) The Administrative Law Judge distinguished this case on the ground that, here, the employees do not have their own entrance and thus cannot be identified. Since we do not agree with his finding concerning identification, any material distinction between *May Department Store Company* and the present case vanishes.

[39] As noted above, we agree with our colleagues that Respondents have applied a nonemployee no-solicitation rule in a discriminatory manner. However, we do not believe that this finding alone is sufficient to warrant an order affirmatively requiring that Respondents permit nonemployee union solicitation on its sidewalk or anywhere else. In *Babcock & Wilcox*, 351 U.S. at 112, the Court held that an employer's property rights must "yield to the extent *needed* to permit communication of information on the right to organize." (Emphasis supplied.) In our view, this language and the context in which *Babcock & Wilcox* was decided indicate that property rights need not yield to Sec. 7 rights in these cases absent a showing of necessity; namely, that no reasonable alternative method for communicating with employees exists. A finding that an employer has discriminated with respect to those whom it has granted access to its property does not address the issue of whether access is needed and, therefore, cannot justify the granting of such access. Moreover, such a remedy in effect creates a right which did not initially exist, thereby punishing the employer for past transgressions rather than remedying the unfair labor practice. Accordingly, we believe that, in order to remedy the discriminatory enforcement of its nonemployee no-solicitation rule, Respondents should be required only to cease and desist from applying the rule in a discriminatory manner, thereby permitting union access to the same extent, if any, that nonunion solicitation is permitted. In this limited respect, we agree with the Order mandated by our colleagues.

[40] 436 U.S. 180 (1978).

[41] *Id.* at 205.

[42] *Id.* at 205–206, fn. 41, citing *N.L.R.B.* v. *S & H Grossinger's Inc.*, 372 F.2d 26 (2d Cir. 1967), and *N.L.R.B.* v. *Lake Superior Lumber Corporation*, 167 F.2d 147 (6th Cir. 1948), enfg. 70 NLRB 178(1946).

[43] Compare cases cited in fns. 5 and 6, *supra*, with *Rochester General Hospital*, 234 NLRB 253 (1978); *Dexter Thread Mills, Inc., d/b/a Lee Wards*, 199 NLRB 543 (1972); *May Department Store Company, d/b/a Meier & Frank Co.*, 198 NLRB 491 (1972); *The Falk Corporation*, 192 NLRB 716 (1971); *Monogram Models, Inc.*, 192 NLRB 705 (1971). But see *Scholle Chemical Corporation, et al.*, 192 NLRB 724 (1971), enfd. 82 LRRM 2410, 70 LC ¶13,341 (7th Cir. 1972).

[44] See *Hutzler Brothers Company*, 630 F.2d 1012 (4th Cir. 1980), where the court denied enforcement because of the absence of evidence in support of the Board's finding that alternative methods of communication were unvailable to the union in that case.

[45] *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. at 205–206, fn. 41; see also *Giant Food Markets, Inc.* v. *N.L.R.B.*, 633 F.2d 18 (6th Cir. 1980).

problems common to many if not all organization campaigns, whether the employer involved does business at a relatively small, unenclosed, shopping center,[46] a factory,[47] a hospital complex, or similar locations.[48] In reaching the result here on the scant evidence presented, we fear that our colleagues have, at the very least, paved the way for a broad "shopping center exception" to the general rule that an employer may prohibit nonemployee union solicitation on private property. We, therefore, dissent.

[46] We need not express any opinion as to whether a different result herein would obtain if Respondents' premises were located in an enclosed "mall" facility.

[47] See, e.g., *Dexter Thread Mills, d/b/a Lee Wards*, 199 NLRB 543 (1972); *Monogram Models, Inc.*, 192 NLRB 705 (1971).

[48] *Rochester General Hospital*, 234 NLRB 253.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT maintain in effect, announce, assert, enforce, publish, display, disseminate, communicate, or threaten any total ban on lawful organizational solicitation under the Act by our employees on our premises.

WE WILL NOT discriminatorily apply or enforce, against employees or nonemployee union representatives, any rule forbidding solicitation on our premises.

WE WILL NOT maintain in effect and enforce "Woolco Policy Number 3G" pertaining to soliciting or any other policy, rule, regulation, or requirement totally forbidding solicitation by any nonemployee at all times and on all parts and portions of our premises.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL rescind and annul any and all prohibitions of lawful organizational solicitation under the Act by our employees on our premises.

WE WILL rescind and annul "Woolco Policy Number 3G" pertaining to soliciting by nonemployees or outside persons.

WE WILL permit our employees to engage in orderly solicitation on behalf of a union or unions during nonworking time on all portions of our premises except sales floors and automotive services shops while they are open to customers.

WE WILL permit nonemployees, including union representatives, to engage in orderly organizational solicitation of our employees, lawful under the Act, on our sidewalks and parking areas.

AMERON AUTOMOTIVE CENTERS, A DIVISION OF KELLY-SPRINGFIELD TIRE CO.; F.W. WOOLWORTH COMPANY D/B/A WOOLCO DIVISION

DECISION

PRELIMINARY STATEMENT; ISSUE

STANLEY N. OHLBAUM, Administrative Law Judge: This consolidated proceeding[1] under the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* (Act), was heard before me in Hauppauge and Brooklyn, New York, on 14 hearing days between April 18 and August 16, 1979, with all parties participating throughout by counsel or other representative and afforded full opportunity to present evidence, arguments, proposed findings and conclusions, and briefs, which, after unopposed time extensions on applications of counsel, were received from the General Counsel and counsel for Respondents-Employers on September 28, 1979.[2] Record and briefs have been carefully considered.

[1] *Cases 29-CA-6676-1 and 29-CA-6676-2*: order of consolidation and complaint dated November 30, 1978, growing out of charges filed on September 20, 1978; *Case 29-CA-6736*: complaint dated December 29, growing out of charge filed on October 18, 1978; *Cases 29-CA-6823 and 29-CA-6914*: order of consolidation and complaint dated February 28, 1979, growing out of charges filed on November 30, 1978, and January 8, 1979; *Cases 29-CA-7015 and 29-CA-7053*: order of consolidation and complaint dated April 13, growing out of charges filed on February 16 and March 2, 1979; *Case 29-RC-4321*: Regional Director's March 23, 1979, supplemental decision on objections, order consolidating cases, and referring for hearing, and notice of hearing, arising out of August 28, 1978, petition, subsequent decision and direction of election, four November 14, 1978, elections, and November 21, 1978, objections by petitioner Union to conduct affecting election results.

[2] A subsequent letter, dated October 1 and received on October 11, 1979, commenting upon the General Counsel's brief, was received from

Continued

In view of the settlement among the parties of all other issues on June 22, 1979, and my order on that date approving the same and severing the settled issues,[3] the sole remaining issue for determination here is the propriety of Respondents' no-solicitation rules and their application, which are alleged to have been violative of Section 8(a)(1) of the Act.

Upon the entire record and my observation of the testimonial demeanor of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

At all material times, Respondent Ameron Automotive Centers, a Division of the Kelly-Springfield Tire Co. (Ameron), has been and is a Missouri corporation, with principal office and place of business in St. Louis, Missouri, and other places of business throughout the United States, including Rocky Point, Patchogue, Bridgehampton, Riverhead, and Lake Ronkonkoma, Long Island, New York, engaged in the sale and distribution of automotive equipment and supplies and related products, and in automotive repairs. During the 12-month period immediately antedating issuance of each of the complaints herein, representative periods, said Respondent has, in the course and conduct of its said business, derived therefrom gross sales revenues exceeding $500,000. During the same period, said Respondent has also, in the course and conduct of its said business, purchased and received delivery of other goods and materials valued in excess of $50,000, directly in interstate commerce from States of the United States other than those where Respondent's receiving places of business are respectively located.

At all material times, Respondent F. W. Woolworth Company, doing business as Woolco Division (Woolco), has been and is a New York corporation, with principal office and place of business in the county, city, and State of New York, and other places of business throughout the United States, including Rocky Point, Patchogue, Bridgehampton, Riverhead, and Lake Ronkonkoma, Long Island, New York, engaged in the retail department store business and in sale and distribution of merchandise offered for sale therein. During the 12-month period immediately antedating issuance of each of the complaints herein, representative periods, said Respondent has, in the course and conduct of its said business, derived therefrom gross sales revenues exceeding $500,000. During the same period, said Respondent has also, in the course and conduct of its said business, purchased and received delivery of merchandise, goods, and materials valued in excess of $50,000, directly in interstate commerce from States of the United States other than those where said Respondent's receiving places of business are respectively located.

At all material times, Respondents Ameron and Woolco have jointly operated the retail automotive departments located in Respondent Woolco's facilities throughout the United States, including those in Rocky Point, Patchogue, Bridgehampton, and Riverhead on Long Island, New York, and have been and are joint employers of the employees employed in said automotive departments.

I find that at all material times Respondents Ameron and Woolco have each been and are employers engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act; and that at all of those times Charging Party-Petitioner Union has been and is a labor organization[4] as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

As has been indicated, the sole remaining issue here is the propriety of Respondents' no-solicitation policies and practices. These will be addressed following a preliminary review of the situation and circumstances under which they were and are being applied.

A. *Facts as Found*

1. Description of Respondents' premises, the "Malls" in which located, areas which they serve, access routes, Respondents' employees' home locations, and related facts

Since the parties agree[5] that Respondents' five aforementioned business premises and their "mall" configurations are "substantially similar," only Respondents' Rocky Point premises—the specific characteristics of which were developed in detail at the hearing—need here be described. It may accordingly, as indicated by the parties, be assumed that, except to the extent specifically otherwise pointed out, the description of Rocky Point holds materially true for Respondents' other four Long Island locations as well.

Respondents Ameron and Woolco, linked since around 1962 by nationwide agreement under which Woolco licenses Ameron to operate automobile accessory and repair departments in conjunction with and at the same hours as Woolco's retail sales stores, operate 378 branch facilities with around 2,600 employees. Under the terms of the license (G.C. Exh. 75, p. 4, art. 8), Woolco reserves the right to direct the manner in which the automotive departments are operated, including the right to cause the dismissal of any Ameron employee and the right to promulgate and enforce Woolco rules and regulations (*id.*, art. 9). Respondents' department stores/automotive centers are located within shopping "malls" containing other retail establishments. The ap-

Respondents-Employers. Its contents having been noted, that letter is being filed with the briefs and record.

[3] The order and settlement stipulation of June 22, 1979, are incorporated into the record as Jt. Exh. 1 of the parties. A June 22 letter from counsel for the General Counsel to Paul R. Kreshon and a July 12 letter (with attached signed stipulation) from counsel for the General Counsel to me, are incorporated into the record as Judge's Exhs. 2 and 3.

[4] Although denied in Respondent's answer, I so find based on uncontroverted credited testimony of the General Counsel's witness, Koenig, as well as the Board's certification of Charging Party as a labor organization.

[5] Resp. br., p. 5; G.C. br., p. 27.

proximate sizes of the "malls" of which Respondents' premises here chiefly involved form a part are:

Mall Location	Mall Size (apx. sq. ft.)
Rocky Point	871,200 (20 acres)
Patchogue	522,720 (12 acres)
Bridgehampton	566,280 (13 acres)
Riverhead	958,320 (22 acres)

The foregoing four malls located in, forming part of, or serving dispersed surburban or semirural (according to Respondent Woolco's Long Island District Manager Eitapence, "very rural") communities, are unfenced (except possibly in some rear areas) and approached and left by way of entrances/exits or accesses/egresses from vehicular highways or secondary roads; for example, the Rocky Point mall has a two-lane entrance/exit from/to New York State Route 25A, as well as two two-lane easterly access/exit points from/to Rocky Point Road (Resp. Exh. 22), each open 24 hours per day and each with a stop sign only for traffic exiting from the mall.[6] There is no sentry or guardhouse or post at any mall access point. Very few persons, including employees, come to the mall other than by automobile;[7] the malls contain large vehicular parking areas—at Rocky Point, for 1,200 cars (*id.*), not only in the central mall but also extending around the entire perimeter of the buildings, including sides and rear, and unearmarked for customers of specific stores or businesses. Approximately 2,000 customers patronize Respondents' Rocky Point store each weekday; 4,000 each Saturdav and each Sunday; and on holidays far more.[8] Normally, Woolco customer traffic is heaviest at opening time of the stores (9:30 a.m.; 10 a.m. in October 1978), lunchtime (11:30 a.m.–1:30 p.m.), and after 7 p.m.; Ameron customer/automotive traffic is sporadic throughout the day and evening.

Respondents' leased building at Rocky Point is 1 of about 30 buildings or stores and by for the largest single structure (over 93,000 square feet, about 379 feet long by 250 feet deep, irregular) on that mall. Although it has two levels, customer sales are restricted to the street level. The Ameron automotive area (accessories and shop) is located as a sort of wing at the street level of the northwesterly corner of the building structure (Resp. Exh. 22), with its own bay entrance on the north as well as an interior entrance through the Woolco store. In addition to that exterior entrance, there are three other customer outside entrances to Respondents' Rocky Point building, all at street level—the main entrance (easterly side of building, about 260 feet from the Route 25A mall entrance and about 600 feet from the Rocky Point Road mall entrance (see Resp. Exh. 22, scale 1":50'), the entrance to Woolco's Harvest House public restaurant (easterly side of building), and the entrance to the Woolco garden center (northerly side of building). Respondents' structure consists basically of the following segments: by far the largest part, Woolco department-store retail sales area, including its garden center; the Woolco public restaurant, known as Harvest House; and the Ameron automotive accessories and repair shop. There is a public sidewalk at least at the front of the building (main entrance and Harvest House restaurant entrance).[9]

In its Rocky Point building (as well as its other locations), Respondent Woolco operates a public restaurant (approximately 25 by 28, with tables, booths, and counter, total capacity 89–99 with waiter/waitress service), known as Harvest House, with an exterior entrance from the front sidewalk and exit through the Woolco retail sales store, open to public and employees alike. Respondent Woolco's Harvest House restaurant at Rocky Point generates approximately 10 percent of its profit there, as an operating department of that store, with its regular employment and other store policies applicable there as in all other departments. There is no sign or notice anywhere in Harvest House (or elsewhere in any public portion of Respondents' premises) in any way restricting or limiting access, entrance to, or use of that restaurant, or any activity therein, to or by only customers, employees, or other persons. In other words, Harvest House is a public restaurant ostensibly open to all members of the public without restriction. There are other public restaurants, not owned or operated by either Respondent, within each mall.

Respondents regularly employ a total of 600 to 800 employees at the 5[10] locations on Long Island which have been mentioned, with 100 to 130 at each location (about 119 at Rocky Point), of whom (Rocky Point Woolco) approximately 80 percent are female. Employees are not required to wear distinctive uniforms or garb when entering or leaving the Woolco or Ameron store or shop, although more than half wear (sometimes under outercoats) or carry smocks—without distinctive store name or symbol—entering or leaving, and employees are required to wear two badges—one with Woolco and the employee's name (usually only the first name, with a last initial only) and the other a Woolco promotional badge—as well as distinctive garb[11] only while at work within the store or automotive shop. Most (60–70 percent) employees arrive at the store at or around 9:20 a.m.—about 10 minutes before the 9:30 a.m. store opening time,[12] the remainder (e.g., office employees) one-half hour to 45 minutes before store opening. Employees are required to enter and leave through the main (i.e., front) entrance to the store; customers may enter or leave through any entrance/exit. Employees are allowed 1 hour for lunch or dinner (45 minutes on Sunday), which they may take anywhere (on premises in Harvest House restaurant—at a 10-percent discount, or in employees' lounge (use limited to employees and only soft

[6] Patchogue and Riverhead malls likewise each have three vehicular access/exit points, while Bridgehampton (employing as many as over 100 employees seasonally) has only one (from/to N.Y. S. Route 25, Sunrise Highway.

[7] Port Jefferson, the nearest railroad station to Rocky Point, is about 10 miles distant.

[8] Estimates of Respondents' Rocky Point Woolco Assistant General Manager Zimmerman.

[9] Patchogue has two customer entrances, and Riverhead and Bridgehampton one each, all fronting on public sidewalks.

[10] Including Lake Ronkonkoma.

[11] Salespersons, a greenish-acquamarine smock; restaurant employees, a gold skirt with white blouse; mechanics, work trousers with grayish shirt; manager, dress slacks with shirt and tie.

[12] In October 1978, store opening time was 10 a.m.

drinks vended), or off premises), and a 15-minute break each 4 hours. (Not all employees have the same hours, mealtimes, or breaktimes, although the "basic" employee lunchtime is from noon to 1 p.m.) Employee cars display no identifying name, emblem, or mark; and, although there are two specially designated areas for employee parking,[13] those areas are not restricted to employees, and in actual practice employees park elsewhere as well—with no signs forbidding such parking. At 9:20 p.m. a loudspeaker announcement is made that the store will close in 10 minutes. At 9:30 p.m. a loudspeaker announcement is made that the store is closed, lights are dimmed, and customers are requested to leave. The full complement of employees—around 30 to 45 (60 or 70 on weekends) or so at Rocky Point, not necessarily the same as reporting in the morning, and about 30 percent of whom (employees leaving at night) are part-timers who reported around 5:30 p.m. and only about 10–15 percent full-timers[14]—leave some minutes later.

2. Respondents' employees' union organizational solicitational attempts, Respondents' countermeasures, and related facts

Following earlier expressions of interest in the summer of 1978 from an Ameron employee, union organizational activities commenced in mid-August 1978 at all of Respondents' Long Island locations here involved, followed by later August union request for recognition and August 28, 1978, petition to the Board for election and certification on behalf of certain Woolco/Ameron employees.

The employees' and Union's efforts to organize were effectively thwarted through the Union's inability to convey its message to Respondents' employees because of their presumably relatively distant geographic commuting dispersal from Respondents' locations; its exclusion from all portions of Respondents' premises, including its public restaurant, employees' lounge, and even sidewalks; its inability to identify or distinguish employees from customers entering or leaving Respondents' building or even the mall; the unfeasibility of stopping vehicles at mall entrances for employee identification and membership recruitment purposes; its inability to ascertain employees' names and addresses, and in any event the unfeasibility as well as undue expense of contacting individual employees over a widely dispersed commuting area; and the prohibitive expense as well as other impracticability of advertising by mass communicational media (television, radio, and newspapers). When handbilling was attempted on October 7 on the public sidewalk outside of Respondents' Rocky Point premises, Respondents' managers threatened arrest, summoned the police, and, although they did not actually confiscate the handbills from employees (and others) entering the store, they at least invited surrender thereof into their hands and discarding into trashcans emplaced for that purpose. Handbilling, ineffectively attempted thereupon, but on police suggestion confined to parking areas, was shortly thereafter abandoned as fruitless; and in February 1979 again resulted in the police being summoned and indicating it should be confined to parking areas. On October 30, Respondents dispatched to the Union a telegram calling attention to its rule forbidding "soliciting . . . by any outside person, organization, or organization representative among the selling and nonselling employees on the premises of this store at any time" and threatening that violations thereof would be considered to be "criminal trespassing" (Resp. Exh. 1). At the same time, Respondents issued their own antiunion propaganda, urging their employees not to join the Union, and calling attention to store closings because of excessive operational costs, as well as the alleged compelled obligation of unionized employees to strike upon penalty of fines (G.C. Exhs. 22 and 23). The Union held organizing meetings, during its campaign, at a motel about 20 miles distant from Rocky Point, as well as at a location 10 miles distant, but each was poorly attended. Organizational literature affixation to parked vehicles had been abandoned as impracticable because of the large volume of cars streaming through and scattered throughout the mall parking areas without any way of distinguishing employees' from customers' cars. According to Respondents' Long Island district manager, Eitapence, Suffolk County on Long Island, New York—in which Respondents' premises here are located—has very little mass transportation, and he estimates that 90 percent of their employees drive to and from work.

3. Availability of mass communicational media for union organizational purposes

Television, radio, newspaper, and billboards exist on Long Island and are, theoretically, purchasable for union organizational purposes. Uncontradicted testimony by Union President Koenig establishes that not only has such newspaper advertising been ineffective, but that its cost, as well as the cost of other mass communicational media, is prohibitive:

Medium	*Cost*
Local newspaper	$4000 per day for 1/2-page advertisement[15]
Radio	$900 per minute (prime time, with signed contractual obligation)
Television	$6,000-$8,000 per minute (prime time), plus as much as $10,000

[13] I.e., north of Respondents' building, adjacent to Route 25A, and south of the "Car Wash" northeasterly from Respondents' building.

[14] About 60 percent of Respondents' Rocky Point employees report before morning store opening. Regular employees work an 8-hour shift.

[15] Notwithstanding this uncontroverted testimony of Koenig, the record otherwise establishes that advertising cost in Pennysaver News, a Rocky Point publication, in August 1979 was at the rate of $3 or $4 for 15 words of *classified* advertising (Resp. Exh. 27, p. 2); and in Suffolk Life, another local publication, in July 1979 at the rate of $9.90 "regionally" or $17.95 for "4 regions" for the first 10 words, of *classified* "want ads" (Resp. Exh. 28, p. 16). There is no showing as to the cost of full or partial page (unclassified) advertising in either of these publications.

program production cost.[16]

B. *Further Findings, Resolution, and Rationale*

1. Disparate application of Respondents' no-solicitation rules

Credited testimony[17] establishes that, notwithstanding its purportedly total ban on solicitation by "any outside person, organization or organization's representative" (Resp. Exh. 16, par. 3G), Respondents have tolerated or sanctioned, and beyond that their supervisory personnel have on occasion themselves participated in, such allegedly proscribed solicitation. Thus, while Respondents take the position that their ban against solicitation by "any outside person, organization or organization's representative" applies to their sidewalks as well as their store and shop premises, Woolco Rocky Point Assistant Manager Zimmerman concedes that as recently as the summer of 1978 they permitted the sale of tickets on their sidewalks by the Knights of Columbus, as well as, in the fall of 1977, by the fire department and by a veterans' organization, in their parking lots abutting their sidewalks. Such permitted use of Respondents' sidewalks is confirmed by Zimmerman's superior, Woolco Rocky Point Manager Turmel, as well as by Woolco Long Island District Manager Eitapence. Beyond this, credited testimony of General Counsel witnesses Stasio and Packard establishes that up to around Labor Day 1978 magazine sales solicitors regularly visited Ameron Rocky Point automotive shop premises, vending or soliciting subscriptions for magazines, openly and in the presence of Ameron Shop Manager Friedman, who himself was observed to purchase a subscription. At Respondents' Ameron Riverhead premises, during the summer of 1978, book solicitation among employees, in the presence of Ameron Shop Manager Patton, was also observed by Packard, a manager-trainee there. Without explanation neither Friedman nor Patton was produced to dispute this testimony, which I credit. Furthermore, as credibly testified to by Stasio and Lada (former Ameron mechanics at Rocky Point), not only were magazines and magazine subscriptions openly vended among Respondents' personnel in the automotive shop at Rocky Point, but also, regularly and openly in the presence of supervisory personnel, clothing, tools (perhaps as often as every week), and stereo equipment; and although it was not until January 1979 that Ameron District Manager Anastasio—who prior to then had without demur witnessed such solicitations and purchases taking place, as well as Rocky Point Shop Manager Romines—was observed telling a tool salesman not to solicit, even after that such "outside person" solicitation, sales, and purchases nevertheless continued within the shop. Moreover, coffee/sandwich/cigarette solicitation/sales by an "outside person" to Ameron Rocky Point mechanics also took place in the fall of 1978 or possibly even in January 1979, at times within the shop itself.[18] I credit General Counsel witness Lada's testimony, in preference to Ameron Rocky Point Shop Manager Romines' indistinct recollection, that when the driver of the coffee truck asked Romines if he could come in daily to vend his wares, Romines replied, "Sure, no problem." Indeed, testifying as Respondents' witness on surrebuttal, Romines conceded that when his mechanics asked him if they could make purchases from the truck (or trucks—according to Romines there were two) in the shop, Romines responded, "I don't see any reason why not," and they did. Concerning the solicitation and sales of tools to the mechanics, although Romines conceded that he had, at least for some weeks after his advent as Ameron Rocky Point shop manager in mid-September 1978, permitted solicitation and sales to mechanics there by tool salesmen, until later instructed by District Manager Anastasio to stop it, I credit the testimony of the mechanics as above described, that they nevertheless thereafter continued openly to do so. Furthermore, as already indicated, without explanation Rocky Point Ameron Manager Friedman, Romines' predecessor to September 1978, was not produced to dispute in any way the mechanics' testimony describing practices up to that time.

From the foregoing it is apparent and I find that Respondents' application of their no-solicitation rule was on a selective basis and not universally as argued (but not even so testified to by Respondents' own witnesses). It is well established that disparate application of even an otherwise valid no-solicitation proscription, so as to preclude union organizational solicitation while permitting or sanctioning other solicitation, violates Section 8(a)(1) of the Act. See *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 803, fn. 10 (1945); *Revere Camera Company* v. *N.L.R.B.*, 304 F.2d 162, 165 (7th Cir. 1962); *N.L.R.B.* v. *Hill & Hill Truck Line, Inc.*, 266 F.2d 883, 886 (5th Cir. 1959); *Rockwell International Corporation*, 226 NLRB 870, 875–876 (1976); *The Contract Knitter, Inc.*, 220 NIRB 558, 560 (1975); *Mason & Hanger-Silas Mason Co., Inc.*, 167 NLRB 894 (1967), enfd. as modified 405 F.2d 1 (5th Cir. 1968); *Wigwam Mills, Inc.*, 149 NLRB 1601, 1608–10 (1964), enfd. 351 F.2d 591 (7th Cir. 1965); *Bannon Mills, Inc.*, 146 NLRB 611 (1964); *Peyton Packing Company, Inc.*, 49 NLRB 828, 843–847 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944).

It is accordingly determined that Respondents' disparate application of their no-solicitation rule was and is in violation of Section 8(a)(1) of the Act.

2. Respondents' no-solicitation rules applicable to its employees (as well as to nonemployees)

a. *Written*

Credited testimony,[19] not directly controverted, establishes that right after Labor Day 1978, on the heels of

[16] No data were supplied covering the cost of billboard advertising, although Respondents' surrebuttal witness, Eitapence, testified that the nearest billboard to Rocky Point is on Route 25 (*not*, it is to be noted, on Route 25A, which leads to that store), about a mile away. In the absence of evidence to the contrary, there is no reason to suppose or assume that such advertising would be effective, practical, or economically feasible, for union organizational purposes here.

[17] General Counsel witnesses Stasio, Packard, and Lada; Respondents' witnesses Zimmerman, Eitapence, and Turmel.

[18] While Respondents showed that the coffee, etc., vendor also purchased tires from Respondents, this does not diminish the fact that the "outside" vendor did in fact solicit the mechanics.

[19] General Counsel witnesses Stasio, Lada, and Packard.

the inception of the Union organizing campaign at Rocky Point, a sign[20] was mounted on the automotive service shop desk there, tersely stating "NO SOLICITING" or "NO SOLICITING ALLOWED." The sign was maintained there until shortly before the Board-conducted election of November 14, 1978. There was no testimony by any of Respondents' witnesses controverting this testimony, which I credit.

Inasmuch as this blanket proscription of solicitation, at least in its application to Respondents' own employees, was much too broad and sweeping, interdicting as it did all solicitation by employees, wherever carried out and even during nonworking time and in noncustomer trafficked areas[21] and while the store and shop were not open for customer business, it was, under established law, clearly violative of Section 8(a)(1) of the Act and it is so determined. See *Republic Aviation Corporation* v. *N.L.R.B., supra* at 805; *Mason & Hanger-Silas Mason Co. Inc.* v. *N.L.R.B.*, 405 F.2d 1 (5th Cir. 1968); *Jas. E. Matthews & Co.* v. *N.L.R.B.*, 354 F.2d 432, 440–441 and cases cited (8th Cir. 1965), cert. denied 384 U.S. 1002 (1966); *N.L.R.B.* v. *Harold Miller, et al., d/b/a Miller Charles & Co.*, 341 F.2d 870, 873–874 (2d Cir. 1965); *N.L.R.B.* v. *United Aircraft Corp.*, 324 F.2d 128 (2d Cir. 1963), cert. denied 376 U.S. 951 (1964); *King Radio Corporation, Inc.*, 172 NLRB 1051, 1052–56 (1968), enfd. 416 F.2d 569, 571 (10th Cir. 1969), cert. denied 397 U.S. 1007 (1970); *Bannon Mills, Inc.*, 146 NLRB 611 (1964).

b. *Oral*

Respondent Ameron former Rocky Point mechanic, Stasio, testified that on September 16, 1978, Woolco Rocky Point Manager Turmel said to him, in the presence of Ameron Manager Romines, "[I have] a few choice words for you . . . . If [I see you] so much as talking to any of [my] employees, or soliciting, inside or outside of the store, [I will] have [you] out of there," to which Stasio responded, "[You can't] talk to me like that" and walked away. On cross-examination, however, Stasio seemingly professed inability to "recall" whether Turmel limited his remarks to "working time." According to positive testimony of Store Manager Turmel, however, he told Stasio—in the presence of Romines—that Stasio was not permitted to solicit on the premises *while at work or during working time* and imposed no other restriction upon solicitation by Stasio.[22] Testifying on the same general topic, General Counsel witness Renita Wolf, Ameron Rocky Point cashier/salesperson, testified credibly that within 2 weeks after she signed her union authorization card (dated August 15, 1978), she was told by Woolco Assistant Manager Zimmerman that the store did not want its employees to have anything to do with the Union and that any employee caught talking about the Union *during working time* would be fired. General Counsel witness Lada, another former Ameron mechanic at Rocky Point, testified that toward the end of January 1979, while engaged in discussion in the shop with customer-friend Oliva concerning union benefits and desirability, Ameron District Manager Anastasio, who (with Ameron) Shop Manager Rominess) overheard this, informed Oliva he could not solicit "in the shop or in the store," and escorted him out—after Oliva had earlier been distributing union literature (received by Oliva from Lada). Finally, *General Gounsel* witness Drossel, a former manager-trainee at the Ameron auto shop at Rocky Point, testified that at a supervisory staff meeting in October 1978 Respondents' supervisors were instructed by Respondents' counsel, Christopher Hoey, to assure that employees did not talk to union solicitors *during working time.*

In the resulting somewhat blurred state of the record on this particular topic, I do not consider that a finding that Respondents *orally* forbade *employee* solicitation so as clearly to violate the Act, would be justified. To begin with, it appears to me that the fair intendment and interpretation of the described remarks to Wolf and Lada was that Respondents thereby orally forbade employee solicitation in their store or shop—both customer public sales and service areas—during those employees' *working* time, which is not violative of the Act. *Peyton Packing Company, Inc.*, 49 NLRB 828 at 843–844 (1943), quoted with approval in *Republic Aviation Corp.* v. *N.L.R.B., supra* at 803–804. Insofar as the conflict in testimony between Stasio and Turmel on this subject is concerned, on testimonial demeanor within the framework of the record as a whole, I prefer and therefore credit the testimony of Turmel, who in this aspect impressed me as a more reliable witness and possessed of better recollective capacity than Stasio; and since in any event I would be unjustified in finding that the testimony of Stasio in this aspect clearly or substantially preponderates over that of Turmel, the General Counsel has failed in this aspect to sustain the burden of proof and persuasion which are his. Cf. Administrative Procedure Act, 5 U.S.C. § 556(d); *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 229, 230 (1938); *Blue Flash Express, Inc.*, 109 NLRB 591, 592 (1954); Attorney General's Manual on the Administrative Procedure Act 75 (1947).

It is accordingly determined that it has not been established by substantial credible evidence upon the record as a whole that Respondent in violation of the Act orally forbade solicitation by its employees.[23]

[20] Variously described as 8 inches by 11 inches (Stasio), 4 inches by 8 inches (Lada), and 7 inches by 10 inches (Packard).

[21] Even in noncustomer sales or service areas; cf. *Goldblatt Bros., Inc.*, 77 NLRB 1262, 1263 (1948); *May Department Stores Company*, 59 NLRB 976 (1944), enfd. 154 F.2d 533 (8th Cir. 1946), cert. denied 329 U.S. 725 (1946); *Marshall Field & Company*, 98 NLRB 88, 98–99 (1952), modified 200 F.2d 375 (7th Cir. 1952); *McDonald's Corporation d/b/a McDonald's of Palolo*, 205 NLRB 404, 405 (1973).

[22] Although called by Respondent in surrebuttal, Romines did not testify concerning this episode.

[23] According to General Counsel witness and former Ameron Rocky Point mechanic Kreshon, on November 13, 1978, at Respondents' Riverhead location (where he was then employed) he was told by Ameron Riverhead Manager Patton that if Kreshon went outside the shop to talk to union representatives he could be fired, even though it was his day off. Kreshon further testified that when he asked Ameron Rocky Point Manager Romines on March 13 whether he could talk to former Rocky Point mechanic Stasio—who had been terminated about 2 weeks before then—in Respondent's restaurant during lunchtime, Romines responded that he could; and that, when Kreshon pressed further and asked if he could be fired for doing so, Romines replied that he could not but that it would be "hard" on him and that he would be "watch[ed]." It would not seem that even if credited—and I would have difficulty in so doing since Kreshon,

Continued

3. Respondents' no-solicitation rules applicable to *non*employees

a. *Respondents' rule*

We come, then, to Respondents' proscription against solicitation by *non*employees, and its application here.[24]

The rule in question is to be found in a printed statement of "Woolco Policy," seemingly revised in 1977 (Resp. Exh. 16) and applicable in Respondents' establishments throughout the country. This companywide policy statement was and is posted in a 14 inch by 22 inch frame on Respondents' personnel bulletin board maintained near their personnel office or in the employees' lounges, located in an area open only to employees, but not elsewhere posted or made known to any employee, customer, or nonemployee at any other place in Respondents' stores or shops.[25] That rule or "policy" is a section "3" captioned "Some Special Instructions,"[26] is:

> Soliciting is not permitted by any outside person, organization or organization's representatives among the selling or non-selling employees on the premises of this Store at any time.

For purposes of our consideration of this topic, it will be assumed—since Respondents have so applied and construe it—that this proscription against "solicitation" by outsiders was intended to apply and applies not only to solicitation by vendors selling merchandise in possible competition with Respondents, but also to union membership "solicitation."

b. *Generally applicable principles*

The generally applicable principles governing union membership solicitation upon an employer's premises have evolved and been laid down in numerous cases at the Supreme Court and lower levels.

The following guiding principles emerge from a review of controlling case law:

1. Accommodation is required between an employer's "property rights" to exclude or inhibit union organizational solicitation upon its premises, and employees' "organizational rights" to engage in or to be the recipients of such organizational solicitation. Neither of these "rights" is absolute, to automatic exclusion of the other.[27]

2. Although employees have a presumed right—subject to appropriate restrictions as to time, place, and manner[28]—to solicit on employer premises, *non*employee organizers may also, under certain circumstances,[29] have the right to carry their organizing message to employees there.

3. Distinct, although to an extent parallel,[30] legal principles apply to union solicitation on the premises of an employer by *non*employee organizers as distinguished from employees.[31]

4. Resolution of the right of access of *non*employees to shopping malls and retail establishments thereon, under current law,[32] requires the application by the Board of the "balancing" considerations referred to by the Supreme Court in *N.L.R.B.* v. *Babcock & Wilcox Co., supra,*

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who repeatedly experienced seeming difficulty in recollection without resort to earlier written statements and who impressed me as a generally less than satisfactory witness—either of these alleged episodes falls clearly within the topic of employer *oral proscription of employee solicitation,* which is the only subject and issue here under consideration, all other aspects of these proceedings having been disposed of by settlement as explained above.

[24] Since Respondents' disparate application of that rule has already been considered, section II,B,1, *supra,* there is no need to rediscuss it here.

[25] Although there may be some question whether the poster in question was actually and visibly posted for employees, as claimed, prior to the inception of the unionizational campaign in the late summer of 1978, I find upon the basis of credited testimony of Respondents' witnesses Zimmerman and Eitapence that it was. It is, however, noted, that, although the poster (Resp. Exh. 16) at the outset refers to a "Welcome to Woolco" booklet distributed to new employees and indicates the "policies and duties" set forth in the poster (Resp. Exh. 16) are derived from or explicated in the "Welcome to Woolco" booklet (G.C. Exh. 6), at least the no-solicitation "policy" set forth in the poster (Resp. Exh. 16, par. 3G) is nowhere to be found in the booklet (G.C. Exh. 6).

[26] It may be of interest to note that the "no solicitation" portion of these "special instructions," while in its terms beamed at and dealing with solicitation by *outsiders* is nevertheless publicized *only* to *employees.*

[27] Cf. *N.L.R.B.* v. *Baptist Hospital, Inc.,* 442 U.S. 773 (1979); *Beth Israel Hospital* v. *N.L.R.B.,* 437 U.S. 483, 492–493 (1978); *Sears, Roebuck & Co.* v. *Carpenters,* 436 U.S. 180, 217 (1978); *Hudgens* v. *N.L.R.B.,* 424 U.S. 507, 521 (1976); *N.L.R.B.* v. *Magnavox Co.,* 415 U.S. 322 (1974); *Central Hardware Co.* v. *N.L.R.B.,* 407 U.S. 539, 542–544 (1972); *N.L.R.B.* v. *United Steelworkers of America [NuTone, Inc.],* 357 U.S. 357 (1958); *N.L.R.B.* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 112–113 (1956); *N.L.R.B.* v. *Stowe Spinning Co.,* 336 U.S. 226 (1949); *Marsh* v. *Alabama,* 326 U.S. 501, 506 (1946); *Republic Aviation Corp.* v. *N.L.R.B., supra; Thomas* v. *Collins,* 323 U.S. 516, 533–538 (1945); *N.L.R.B.* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 43, 44 (1937); *N.L.R.B.* v. *United Aircraft Corp. and Whitney Aircraft Div.,* 324 F.2d 128, 130–132 (2d Cir. 1963); *Marshall Field & Co.* v. *N.L.R.B., supra; N.L.R.B.* v. *Lake Superior Lumber Corporation,* 167 F.2d 147, 150–152 (6th Cir. 1948); *N.L.R.B.* v. *American Furnace Co.,* 158 F.2d 376, 380 (7th Cir. 1946); *N.L.R.B.* v. *May Department Stores Co.,* 154 F.2d 533 (8th Cir. 1946), cert. denied 329 U.S. 725 (1946); *N.L.R.B.* v. *Cities Service Oil Co.,* 122 F.2d 149, 151–152 (2d Cir. 1941); *Art Metals Construction Co.* v. *N.L.R.B.,* 110 F.2d 148, 150 (2d Cir. 1940); *Scott Hudgens,* 230 NLRB 414, 416 (1977); *H & G Operating Corp. d/b/a Raleigh Hotel, supra.* Employees' organizational rights under the Act include the *right to be solicited.* "[S]elf-organization can be and is severly hampered by lack of assistance from trained, full-time organizers." *Marshall Field & Company, supra.* To the same effect, see *Beth Israel Hospital* v. *N.L.R.B., supra; N.L.R.B.* v. *United Steelworkers of America [NuTone, Inc.], supra; N.L.R.B.* v. *Babcock v. Wilcox Co., supra; N.L.R.B.* v. *S. & H. Grossinger's Inc.,* 372 F.2d 26, 29–30 (2d Cir. 1967).

[28] *Beth Israel Hospital, supra; N.L.R.B.* v. *Baptist Hospital, Inc., supra; Republic Aviation Corp., supra; Los Angeles New Hospital,* 244 NLRB 960 (1979).

[29] I.e., (1) where the employer's place of business is not located in reasonable proximity to established communities where a large portion of the employees reside, (2) normally efficacious and reasonably economical channels of public communication with the employees are not "readily available," and (3) "the employer's [no-solicitation] notice or order does not discriminate against the union by allowing other distribution." *N.L.R.B.* v. *Babcock & Wilcox Co., supra* at 114 and 112. See also *Marshall Field & Co., supra* at 379. Insofar as union organizational membership, including union "card" or other union representational designation documentation is concerned, such representational documentation proffers to solicited employees are looked upon by the Board as incidents of "solicitation" rather than as "distribution," so that its "solicitation" rather than "distribution" presumptional principles apply. *The Rose Company,* 154 NLRB 228, 229, fn. 1 (1965); *Stoddard-Quirk Manufacturing Co.,* 138 NLRB 615, 619, fn. 5, 620–621 (1962).

[30] Cf. *Carolina Mills, Inc.,* 92 NLRB 1141, 1142, 1149, 1168–69 (1951), enfd. 190 F.2d 675 (4th Cir. 1951); *Giant Food Markets, Inc.,* 241 NLRB 727 (1979).

[31] *N.L.R.B.* v. *Babcock & Wilcox Co., supra.* See fn. 32, *infra.*

[32] *Hudgens* v. *N.L.R.B., supra,* in effect renouncing its rationale in *Food Employees, Local 590* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968), and reverting to and reemphasizing the continued vitality of its previous "balancing" test in *N.L.R.B.* v. *Babcock & Wilcox Co., supra.*

and *not* resort to the Constitutional requirements of the first and fourteenth amendments, unless state as distinguished from private action (i.e., restriction of access and organizational activity) is involved.[33]

5. So far as retail sales establishments are concerned, total prohibition of solicitation—by employees as well as *non*employee solicitors—is permissible in customer-trafficked sales or service areas,[34] with the partial limitation—as to public restaurants—noted in paragraph 6, below.

6. So far as employer owned or operated public restaurants—whether or not a part of general retail sales establishments (e.g., department stores)—are concerned, unobtrusive solicitation there by off-duty employees of other off-duty employees (on lunchtime or breaktime) other than restaurant employees is permissible; and access to and unobtrusive solicitation by nonemployee solicitors of employees *other* than restaurant employees, *may* be permissible, depending upon resolution of the *Babcock & Wilcox* "balancing" test; in either case subject to reasonable restrictions to avoid interference with or annoyance to customers in public areas.[35]

7. *Babcock & Wilcox* "balancing" of reasonably available *non*employee *off*-premises union organizing alternatives to *on*-premises access and organizing, require careful, comprehensive, and fair Board weighing of all material operative facts.[36]

8. Where the employer has disparately applied against union organizational solicitation a total or limited proscription against solicitation on its premises—whether by emloyees or nonemployees—the proscription will be treated as violative of the Act.[37]

Application of these guiding principles to the instant case enables resolution of the issues resulting from Respondents' specific applications of their absolute no-solicitation proscription against *non*employee union organizers, solicitors, or visitors.[38]

To begin with, as has been found, Respondents' no-solicitation ban against "outside" solicitation was disparately applied and, on that ground alone, without more, it was in violation of the Act.[39]

Beyond and apart from this, however, there are involved Respondents' interdiction of nonemployees' access to employees on their sidewalks and store entranceways, possibly also in immediately abutting roadway and parking areas, their publicrestaurants (Harvest House), and their employees' lounges—all of which they continue to maintain are their "premises" subject to their no-solicitation rule.[40]

Insofar as Respondents' sidewalks and entranceways are concerned, taking into consideration that they are dedicated to public use and are shared by employees with customers and other pedestrians;[41] no reason appears why reasonable, nondisruptive, limited solicitation not interfering with customer or employee access to or exit from Respondents' premises, should remain under total interdict. The same is true for parking areas.[42]

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[33] *Hudgens* v. *N.L.R.B.*, *supra* at 512-513 , 517-523; *Central Hardware Company* v. *N.L.R.B.*, 407 U.S. 539, 545, 547-548 (1972); *Giant Food Markets, Inc.*, *supra*.

[34] *Beth Israel Hospital* v. *N.L.R.B.*, *supra* at 493; *Marshall Field & Company, supra; Famous-Barr Co. (May Department Stores Company)*, 59 NLRB 976, 979-981 (1944), enfd. 154 F.2d 533 (8th Cir. 1946), cert. denied 329 U.S. 725 (1946); *J. L. Hudson Company*, 67 NLRB 1403 (1946), enfd. 160 F.2d 105 (6th Cir. 1947), cert. denied 331 U.S. 847.

[35] *N.L.R.B.* v. *Baptist Hospital, Inc., supra; Beth Israel Hospital* v. *N.L.R.B., supra* (wherein the restaurant cases referred to by the Supreme Court in fn. 11 involved solicitation of *restaurant employees themselves*); *Marshall Field & Company, supra; Goldblatt Bros., Inc.*, 77 NLRB 1262 (1948), *McDonald's Corporation, supra; Bankers Club, Inc.*, 218 NLRB 22 (1975), and *Marriott Corporation (Children's Inn)*, 223 NLRB 978 (1976), are all readily distinguishable from *Marshall Field, supra*, since in all those cases (other than *Marshall Field*), the employer's *public restaurant employees themselves* were being solicited by the union—a significant circumstance which the Board explicitly characterized as "particularly important" in *Goldblatt Bros., Inc., supra* at 1263, and which it again "note[d] especially" in *McDonald's Corporation, supra* at 408). In *Marshall Field & Co.* v. *N.L.R.B., supra*—even aside from the fact that it is the Board's decision (98 NLRB 88) which is controlling here—the court, in declining enforcement of that portion of the Board's order permitting access of *non* employee organizers to *employees' cafeterias* and restaurants, rested its determination on the circumstance that, unlike those found in the instant case, "the facts established . . . do not present unique handicaps to self-organization" (200 F.2d at 381), while pointing out that the union was actually "permitted to make luncheon appointments and solicit in the company's *public* restaurants, subject to restrictions which the Board found to be valid" (200 F.2d at 382; emphasis supplied).

[36] *N.L.R.B.* v. *Babcock & Wilcox Co., supra*. Appropriate factors for consideration include geographic distances and dispersal of employees' residences; employees' varying shift hours; physical configuration and characteristics of place of employment; location and accessibility of jobsite; feasibility of identifying employees and distinguishing them from customers and other nonemployees; propinquity of employer to other employers, in terms of avoidability of confusion of customers of and interference with business of other employers, as well as avoidance of seemingly "secondary" pressures; interference with employer's normal business; availability, cost, and practicability of alternative methods of communicating with employees (e.g., newspapers, billboards, soundtrucks, radio, television, telephone, mail, suitable meeting places); availability of lists of names and addresses of employees; realistic comparison of efficacy of actually versus theoretically available methods of communicating the union's organizational message to the employees. Cf. *Hudgens* v. *N.L.R.B., supra; Central Hardware Co.* v. *N.L.R.B., supra; N.L.R.B.* v. *United Aircraft Corp., supra; May Department Store Company, d/b/a Meier & Frank Co., supra* (employees readily identifiable since required to enter and leave via separate employees' entrance/exit); *H & G Operating Corp. d/b/a Raleigh Hotel*, 191 NLRB 719 (1971); *S. & H. Grossinger's Inc.*, 156 NLRB 233 (1965), enfd. as modified 372 F.2d 26, 29-30 (2d Cir. 1967); *Scott Hudgens, supra; Marshall Field & Company, supra; LeTourneau Company of Georgia*, 54 NLRB 1253, 1260-61 (1944), affd. *sub nom. Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793 (1945); *Peyton Packing Co.*, 49 NLRB 828, 843-844 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730.

[37] *N.L.R.B.* v. *Babcock & Wilcox Co., supra; N.L.R.B.* v. *United Steelworkers of America [NuTone, Inc.]*, 357 U.S. 357, 363 (1958); *Marshall Field Co.* v. *N.L.R.B., supra; Bonwit Teller, Inc.* v. *N.L.R.B.*, 197 F.2d 640 (2d Cir. 1952), cert. denied 345 U.S. 905 (1953).

[38] It is emphasized that to the extent Respondents have sought to impose a similarly broad proscription against *employee* solicitation, it has already been found (*supra*) to have been in violation of the Act and will be voided (*infra*).

[39] See cases cited *supra*, fn. 37.

[40] No question is raised concerning Respondents' right to exclude nonemployee organizers from their customer-trafficked sales and service areas, which is clear. See cases cited *supra*, fn. 34. Nor is any question presented as to the right of nonemployee access to the mall itself, which has not been proscribed or sought to be prevented.

[41] Cf. *Marshall Field & Company, supra*. Unlike *May Department Store Company d/b/a Meier & Frank Co., supra*, where employees had their own separate entrance/exit, at which their organizational solicitation was not interfered with, in the instant case all employees—even mechanics—are required to enter and leave by the customers' front entrance/exit.

[42] Regulation of the exact extent and manner of the exercise of such peaceful organizational solicitation and handbilling is normally handled, in case of abuse, by local police and judicial authorities. If violation of the Act occurs, redress may be sought before the Board. No attempt need here be made to anticipate such contingencies, nor to catalog and prospectively provide for them in their limitless ramifications.

The question of *non*employee access to Respondents' Harvest House public restaurants for union solicitation purposes requires application of the *Babcock & Wilcox* "balancing" test alluded to above.[43]

Substantial credible evidence upon the record as a whole, without effective contradiction, establishes the following circumstances: that Respondents' stores and automotive service shops are located in shopping malls in suburban or semirural areas, drawing customers as well as employees from a widely dispersed and relatively distant areas; that access thereto is by private automobiles over highways and secondary roads; that identification, recognition, or differentiation of the automobiles of Respondents' employees when entering, leaving, or parked within the malls is for practical purposes substantially impossible or unfeasible; that Respondents' employees work different shifts; that Respondents have indicated and made known, through issuance and maintenance of a broad no-solicitation rule forbidding all solicitation by any nonemployee, and through express written and oral notifications to employees and the Charging Party Union that union organizational solicitation of Respondents' employees by nonemployees of Respondents[44] is and will continue to be totally proscribed and forbidden in all areas including Respondents' stores and shops, sidewalks and abutting locations, Respondents' public restaurants, and employees' lounges, upon threat of arrest and prosecution for "criminal trespassing";[45] that it is unfeasible and impracticable for the Charging Party Union to obtain or to attempt to obtain, from Respondents,[46] or otherwise, lists of the names and addresses of Respondents' employees; that utilization by the Union, for organizational purposes, of methods or media of communication to Respondents' employees consisting of mail, telephone calls, telegrams, newspaper announcements and advertisements, billboards, soundtrucks, radio, television, and rental of local assembly sites, would be unduly and unreasonably burdensome and prohibitively expensive, as well as of highly questionable practicality, feasibility, or efficacy, and should not be required in order to enable Respondents' employees to obtain the Union's organizational message; that, because of Respondents' maintenance and enforcement of their total ban against solicitation, substantial proportions of their employees have been unable to receive the Union' organizational message, and have for that reason been restricted, interfered with, restrained, and coerced by Respondents in the exercise of their organizational rights under the Act; and that the organizational methods heretofore sought to be utilized by the Union have proven ineffectual, and have themselves been substantially prohibited and aborted by Respondents.

Under these circumstances and for these reasons, to limit the Union to the relatively distant entrances to the mall itself,[47] and to restricted access to Respondents' sidewalk and parking lots would not suffice, since, among other things, the problems of recognition and differentiation of employees from customers and other nonemployees would remain unsolved. It is accordingly necessary to deal with the question of access by nonemployees, for solicitational purposes, to Respondents' public restaurants (Harvest Houses) and employees' lounges.

Insofar as Respondents' "Harvest House" restaurants are concerned, it is at the outset emphasized that they are open to the public (store customers, restaurant patrons, employees, and others) without limitation or posted or other indication of restriction or of limited license. Respondents do not monitor the private discussions which go on among patrons of those restaurants, nor do they censor the documents which may pass between them. In this aspect, Respondents' position is in direct clash with that of the Charging Party Union, the latter supported by the General Counsel. On the one hand, Respondents insist that their absolute ban against solicitation in their public restaurants is no more than an incident of their right of private property; on the other hand, Respondents' employees, the Union, and the public as represented by the General Counsel, urge that employees have the right to self-organization under the Act, part of which is the right to receive communications from unions. As has been shown above,[48] since neither of these rights is absolute, they must be brought into balance and reconciled.

Respondent Employers urge that communications between the employees and the Union may readily take place other than on its "private property." They suggest, for example, home visits; the Union's answer is that it does not have knowledge of who the employees are, much less where they live in the widely dispersed and here and there densely populated suburban areas involved. The Employers further suggest the Union should resort to television, radio, and news media advertising. Requiring the Union to reach the employees via television, radio, or other news media communications would be both unrealistic and impractical. For one, it would, as shown, be prohibitively costly; for another, the efficacy of such a scattershot approach is at best highly conjec-

[43] See cases cited *supra*, fns. 27, 29, 32, and 35. Employee access to cafeterias/restaurants for union solicitation purposes even in the arguably highly "sacrosanct" premises of hospitals (as possibly distinguished from department stores) met with Supreme Court sanction in *N.L.R.B.* v. *Baptist Hospital, Inc., supra, Beth Israel Hospital* v. *N.L.R.B., supra.*

[44] Findings concerning Respondents' similar proscription against solicitation by *employees* are contained *supra.*

[45] Resp. Exh. 1. It has been pointed out that persons asserting or seeking to exercise rights under the Act should not, in order to enjoy them or in the course of pursuing them, first have to suffer arrest or prosecution, or threat thereof. Cf. *Giant Food Markets, Inc., supra.*

[46] Although the Union made no demand upon Respondents for such a list (cf. *Tennsco Corp.*, 206 NLRB 48 (1973)), or to enter upon their premises, there is no reason for supposing such a demand any more then a demand to meet with employees in their restaurants, would have met with success, in the face of Respondents' other hostile actions toward it, including the threat of prosecution for "criminal trespassing" and the repeated calling of police, as well as Respondents' demonstrated across-the-board hostility toward unionization and any efforts in that direction, and Respondents' currently maintained positions in this litigation. Under such circumstances, union demand upon Respondents for lists of employees and addresses, or to enter their restaurants, would have been a futile gesture, wooden adherence to which need not be technically required. Cf. *Scott Hudgens, supra.*

[47] Union President Koenig testified without contradiction that when he attempted to solicit at a highway entrance to the mall, he was warned away by police for the reason that he was creating a traffic hazard or impediment.

[48] See cases cited *supra*, fns. 27, 29, 32, 35, and 36.

tural. Cf., e.g., *N.L.R.B.* v. *United Aircraft Corp., supra; Hutzler Brothers Company, supra.* Respondents further argue that since their employees on duty at closing time may not leave until customers have done so, they are at that time distinguishable from customers and accordingly readily subject to union solicitation. This argument is of dubious validity at best, since (1) the union solicitor would have no way of knowing when the last customer left, or of distinguishing between the last customers leaving and the first employees leaving, (2) many employees do not work until closing time, (3) Respondents take the position that their no-solicitation rule applies to their sidewalks and closely abutting areas as well as to their building, and (4) such employees that leave after night closing time are undoubtedly anxious to get home rather than to engage in discussions as to whether to join a union. These circumstances indicate that attempted night-time solicitation on Respondents' sidewalks and parking lots after work is simply not a practicable method for Respondents' employees to receive the Union's organizational message. The same is true for employees hastening to get into the store on time within relatively brief minutes before its opening. Respondent's suggestion about organizational meetings in assembly places must similarly be weighed in terms of the wide geographical dispersal of the employees, the necessity to hold such meetings early in the morning before store opening time or late at night after store closing time, the high cost of and national policy to economize upon use of gasoline, and the demonstrated inefficacy of such attempts. Respondents also suggest that the Union could conduct its solicitation activities in a nearby bowling alley, but, even aside from how the bowling alley owner or operator would react thereto, there is no indication of when that could be done nor of how many of Respondents' employees bowl. It is unessential that the Union first have unsuccessfully exhausted all other conceivable avenues of solicitation as a precondition to application by the Board of the *Babcock & Wilcox* "balancing" principle. *Hutzler Brothers Company, supra.* Nor, contrary to Respondents' further contention, do I consider the fact that Respondents' employees first "initiated contact with the Union" (Resp. brief, p. 18), to be determinative so as to render inapplicable otherwise controlling precedent and principle.

Respondents urge that only employees, and not unions, have rights under the Act. Although this contention seems overbroadly stated,[49] in any event under the Act employees have the right to be represented by unions and to deal with and therefore necessarily to communicate with unions, subject, it is true, to avoidance of reasonably avoidable or disruptive impingement upon the conduct of their employer's normal business operations. If, as is the fact here, the employees are exposed to the employer's antiunion exhortations—as is the employer's right—simple fairness requires that they not be for practical purposes absolutely shut off from the message of the union. To be sure, as pointed out in numerous cases cited above, reasonable accommodation may be necessary, upon a case-by-case basis, between the right of the employer to carry on his business without undue disruption and the right of his employees to engage in organizational activities lawful under the Act, including receiving the union's message.[50] Receipt of that message in orderly fashion during nonworking time, even though on public portions of the employer's premises open to nonworking employees on the same basis as the public generally, cannot, under the circumstances of the instant case, be regarded as disruptive of the employer's business. All that the employees and the Union seek here is the right to talk in a public restaurant, in the same way that a union representative and a nonemployee customer may. Employer censorship and proscription of such private conversations on nonwork time in a public facility, even though it happens to be within a building owned and leased by the employer, would appear to be unreasonable as well as impracticable, and, if carried out, under the circumstances here shown, in practical effect to be preclusive of the ability of the employees to communicate with the union at all—and thus preclusive of the employees' right under the Act to organize for collective bargaining. Although, to be sure, the employer has "property rights," the employees have correlatively important legal "organizational rights," and to the extent that the employer's "property rights" may in the context of the instant case be required to yield or bend somewhat to accommodate the employees' "organizational rights," it would be a mild stretch at best. Balancing those rights, as I consider myself required to do,[51] I am persuaded and find that no undue, unreasonable, substantial, or, indeed, significant harm, and no disruption or interference with Respondents' business operations, would result from sanctioning reasonable and undisruptive, private communicational contacts between Respondents' employees and union representatives in Respondents' public Harvest House restaurants during those employees' lunch and break periods.

Since organizational solicitation[52] by Respondents' employees in Respondents' Harvest House restaurants during their nonworking time will be permissible with the lifting herein[53] of Respondents' blanket proscription against solicitation by their own employees,[54] it is diffi-

[49] For example, unions as certified or recognized collective-bargaining representatives have the right—indeed the obligation—to bargain for and otherwise represent all unit employees.

[50] It would fly in the face of reality to give little weight to the circumstances, described above, involved here in connection with Respondents' mall locations, to which, for practical purposes, employees are confined for their entire workday, and to and from which they presumably hastily commute by private vehicles from scattered and relatively distant domiciles. If such considerations are assigned no weight, suburban and semi-rural malls could assume the character of Act-free enclaves which "could largely immunize themselves from [union organizational activities guaranteed under the Act] by creating a *cordon sanitaire* of parking lots around their stores" (*Food Employees, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 at 325 (1968))—so as effectively to foreclose exercise and enjoyment of Congressionally guaranteed Sec. 7 rights.

[51] Cf. *N.L.R.B.* v. *Babcock & Wilcox Co., supra*, and other cases cited *supra*, fns. 27, 29, 32, 35, and 36.

[52] I.e., orderly solicitation not involving littering or other arguably undue burden upon or disruption of Respondents' operations.

[53] See sec. II,B,1, and II,B,2,a, *supra*, and Order, *infra.*

[54] It is to be noted, in this connection, that in two recent cases the Supreme Court has sanctioned employee solicitation even in public restaurants (cafeterias) of hospitals. See *N.L.R.B* v. *Baptist Hospital, Inc., supra; Beth Israel Hospital* v. *N.L.R.B., supra.*

cult on practical grounds to apprehend in what significant way that differs from the very same activity if carried on with similar unobtrusiveness and circumspection by a *non*employee or union representative. Thus, a particular soliciting employee may be just as much (or as little) a stranger to the solicited employee as a particular union representative; and the unobtrusive manner or style of solicitation surely does not turn on whether the solicitor is an employee or an "outsider"—indeed, the "outsider" may be more circumspect than the "insider." This being the case, justification for the distinction must be sought in and based, as indeed Respondents contend, upon a naked "property" right of a vendor to exclude from his premises all persons who do not enter upon the express condition that they do not "talk union" to employees patronizing their public restaurant on their own time. Even apart from the dubious legality of the assertion of such an absolute right or power, in appraising the bona fides of this contention here it is to be noted that nowhere is such a condition or limitation posted or made known to any "outsider"—the *only* posting is to *employees*, in that portion of Respondents' premises restricted to "employees only"; i.e., that portion of Respondents' premises where an "outsider" may not enter. Beyond this, enforcement of any such condition, rule, or requirement is pragmatically impossible. How, for example, could Respondents "police" every conversation between two or more people at the tables of their public restaurants? (For example, nonsolicitational discussions between union solicitors and employees are not proscribed.) And, can it be doubted that "outsiders" (customers, itinerant viewers of merchandise, strollers, etc.) have on occasion discussed their own business, involving solicitation of custom, orders, or services, while partaking of food or drink in Respondents' public restaurants? Since Respondents' employees will not be required during nonworking time to refrain from soliciting unobtrusively in Respondents' restaurants, and since "outsiders" are not put on notice of such a limitation, what valid end does its continued rigid assertion here serve, other than to arbitrarily single out and run a union organizer *qua* union organizer, off its restaurant premises if he dares talk union to an off-duty employee at a private table which they share? While Respondents contend they would summarily eject such a person if observed at a table in their restaurant unobtrusively handing a union card to an employee during a quiet and inaudible private conversation, is it credible that Respondents would summarily eject from their restaurant a customer who during a similar private conversation hands his luncheon companion a charity contribution blank, an order for merchandise, a lease, a proposed insurance policy, or a contract to take home and read? Unobtrusive solicitation in Respondents' restaurants by a *non*employee is thus, for practical purposes, no different from the very same act by an employee, the one involving no greater affront or harm to Respondents' "property rights" than the other.

Balancing the competing rights here, as required, in my judgment their reasonable accommodation requires that Respondents' total proscription against union organizational solicitation by nonemployees be voided, and justifies and requires that reasonable and unobtrusive access to Respondent's Harvest House restaurants be allowed to nonemployee union organizational solicitors to the extent of permitting therein conversations, including the passing or tender of documents, between an individual employee or employees and a nonemployee union or other organizational solicitor while seated at a table in those restaurants, during Respondents' employees' nonworking time, so long as Respondents' employees are permitted to patronize those restaurants;[55] but not (1) table-to-table, across-tables, or strolling solicitation, (2) solicitation at any restaurant counter, or (3) solicitation of any person employed in the restaurant.[56]

Respondent Woolco argues that, since its restaurants are owned and operated by it, even though located in a segregable portion of its premises reached directly from the street (or, as in the case of its Riverhead location, in a nearby but separate building), they are just like other departments of the store and that therefore the usual rule proscribing solicitation in department store customer selling areas applies. (Cf. *Famous-Barr Co.* [*May Department Stores Company*], 59 NLRB 976, 979-981 (1946), enfd. 154 F.2d 533 (8th Cir. 1946), cert. denied 329 U.S. 725 (1946)). I do not agree, except as to solicitation of persons employed in the restaurants themselves.[57] Since patrons—whether employees or nonemployees of Respondents (including, it is to be noted, employees of Respondent Ameron, which has no proprietary interest, role, or relationship in those restaurants) of those restaurants sit at tables discussing their private or other affairs or conducting their business privately, those private table discussions are not the same as solicitations on sales floors milling with customer traffic or while customers are waiting to be served. It is a known fact of life that people the world over talk about things and conduct their business at tables in restaurants. Particularly where, as here, a "balancing" (*N.L.R.B.* v. *Babcock & Wilcox Co., supra*) is applied, no reason is apparent, and no facts have been shown, why such private table discussions by Respondents' employees (other than the restaurant employees)—unlike all other restaurant patrons—should be placed under interdict. On the contrary, subject to reasonable limitations, they should be allowed. Cf. *N.L.R.B.* v. *Babcock & Wilcox Co., supra*, and other cases cited *supra*, fn. 35; *Hutzler Brothers Company, supra; Scholle Chemical Corporation*, 192 NLRB 724 (1971), enfd. 82 LRRM 2410 (7th Cir. 1972); *Oertle Management Company, Inc.*, 182 NLRB 722 (1970); *Marshall Field & Company, supra; N.L.R.B.* v. *Baptist Hospital, supra*; and *Beth Israel Hospital* v. *N.L.R.B., supra.*[58]

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[55] Indeed, under the circumstances shown, those restaurants appear to be "uniquely appropriate" (*Republic Aviation Corp.* v. *N.L.R.B., supra*), places for Respondents' employees to discuss organizational matters, privately and unobtrusively, during their own free time during the day.

[56] We do not address the question of solicitation of Respondents' *restaurant* employees on their own, nonduty time, since that issue is not presented here and the Charging Party has upon the record disavowed interest in doing so. Cf., cases cited *supra*, fn. 35.

[57] See fn. 56 and cases cited in fn. 35, *supra.*

[58] Respondents' express the fear of possible misbehavior in their restaurants by union representatives admitted thereto, and apprehension—colorfully portrayed—that their restaurants may be converted into a "combat zone" for the "strident rhetoric" of "competing unions" (Resp.

Continued

From yet another viewpoint, it may be said that by inviting their employees to eat in their restaurants as paying customers thereof, Respondents have given equal status and rights to those employees as to other restaurant customers, to talk unobtrusively to their guests, or table companions on whatever subjects they wish to discuss, without censorship by the restaurateur.

There remains for determination the question of whether union and other nonemployee organizational solicitors should be allowed access, now forbidden to all other than employees, to Respondents' employees' lounges, for organizational purposes. Those lounges are located in a rear, street-level portion of Respondents' premises, in an area barred to all but Respondents' employees, entered through a door marked "Employees Only." The immediate area also contains not only Respondents' executive or managerial offices with their supporting administrative staffs, but also all of Respondents' financial, personnel, and other records, as well as its *opened safe* and *cash room*, and reserve stock area entrance, ready access to all of which is presumably continuously required during business hours. All of Respondents' employees are bonded. Thus, at present, only bonded persons may enter what is regarded as this "security" area. Respondents argue that to throw open that area to nonbonded outsiders would jeopardize its security, including prominently the cash continuously maintained, deposited, and exchanged therein, and removed therefrom, in the regular course of their business operations; or, alternatively, to undertake costly redesigns, renovations, and reconstruction of their premises in order not to jeopardize the existing security thereof since access is currently limited to bonded employees. I am inclined to agree, particularly since granting access to unbonded nonemployees to Respondents' restaurants (as well as its sidewalks and abutting parking areas) should suffice to enable the employees to receive the Union's organizational message,[59] without jeopardizing the security of Respondents' operations by admitting unbonded strangers to access to its cash repositories or, alternatively, requiring Respondents to undertake the expense of redesigning or reconstructing their facilities and business operations. In my opinion, again "balancing" the competing rights here, going so far is neither required nor warranted. It will accordingly not be required that, under the existing circumstances as shown, Respondents' current practice of excluding all but its own bonded personnel from the area in question, containing the employees' lounge, be altered.[60]

Upon the foregoing findings and the entire record, I state the following:

CONCLUSIONS OF LAW

1. Jurisdiction is properly asserted in these proceedings.

2. Through assertion, maintenance, and enforcement of their no-solicitation rules, in the discriminatory and other manner and to the extent hereinabove in section II, *supra*, applied so as to proscribe, interfere with, and prevent union organizational solicitation by employees and nonemployees, Respondents have interfered with, restrained, and coerced employees in the exercise of rights under Section 7, in violation of Section 8(a)(1) of the Act, and Respondents continue to do so.

3. Respondents' unfair labor practices in violation of the Act, and each of them, have affected, affect, and, unless permanently restrained and enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. Substantial credible evidence upon the record as a whole fails to establish that Respondents or either of them orally in violation of the Act forbade lawful solicitation under the Act by Respondents' employees.

REMEDY

To the extent Respondents have been found to have violated the Act, they should be ordered to cease and desist from such and like and related violations, as well as to take certain affirmative actions in implementation of the cease-and-desist requirements and to carry out the policies of the Act. Respondents should also be ordered to post the usual informational notice conventionally required in cases of this nature.

The affirmative requirements of limited nonemployee access to portions of Respondents' premises, as well as the cease-and-desist provisions of the Order, should be applicable only to the five Long Island, New York, premises of Respondents involved in this litigation, notwithstanding the nationwide applicability of Respondents' no-solicitation "Woolco Policy No. 3G" (*supra*), since no proof was submitted as to the necessity or factual basis for any "balancing" (*N.L.R.B.* v. *Babcock & Wilcox, supra*) of factors in Respondents' other locations throughout the country; nor as to any discriminatory, disparate, or otherwise unlawful application of that or any other no-solicitation rule or requirement as to employees or as to nonemployees at any other location.[61]

br., p. 30). Respondents accordingly (*id.*, pp. 30–31) suggest a way out: use another restaurant (i.e., gore somebody else's ox—"interfere" with another restaurant's "customers," assuming the other restaurant owner does not likewise assert the right to censor the private conversations taking place among its patrons at its tables).

Although such apprehensions of misdeed are speculative, should they eventuate they may readily be handled like all such situations, whoever the misbehaving customer may be, if necessary by resorting to store security personnel, or the police. Such fears do not constitute adequate basis for denial of employees' rights.

[59] Cf. *Marshall Field & Co.* v. *N.L.R.B., supra.*

[60] Nor, particularly in view of the provision here made for access to Respondents' public restaurants, sidewalks, and abutting parking areas, do I consider it necessary or appropriate to throw open the use of Respondents' store toilets for union organizational purposes as the General Counsel proposes.

[61] In a post-brief letter of October 1, 1979 (see fn. 2, *supra*) Respondents' counsel object to what they indicate as the General Counsel's seeking herein of a *J. P. Stevens & Co., Inc.* remedy (245 NLRB 198 (1979)). The cited case is inapposite, and its broadscale remediation is neither suggested nor allowed here.[Recommended Order omitted from publication.]